11-14-2002

Eighth Place

Erin Gordon

Blair Schlecter

EIGHTH PLACE

Nos. 01-1231, 01-0729

In The

SUPREME COURT OF THE UNITED STATES

Fall Term, 2002

Connecticut Department of Public Safety, et al.,

Petitioners,

-against-

John Doe, et al.,

Respondents.

Ronald O. Otte and Bruce M. Botelho,

Petitioners,

-against-

John Doe I, et al.,

Respondents.

On Writ of Certiorari for the United States
Court of Appeals for the Second and Ninth Circuits

BRIEF FOR RESPONDENTS

November 14, 2002
Round # 1: 3:40 P.M.

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QUESTIONS PRESENTED

1. Does the Connecticut Sex Offender Registration Act violate a protected liberty interest of the sex offenders because of the onerous and lengthy registration and notification requirements and because it does not provide adequate due process procedures in violation of the Due Process Clause of the United States Constitution?

2. Does the Alaska Sex Offender Registration Act retroactively punish sex offenders, whose crimes were committed before its enactment by requiring onerous registration and notification requirements, in violation of the Ex Post Facto Clause of the United States Constitution?

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TO THE SUPREME COURT OF THE UNITED STATES:

Respondents, Doe et al. and Doe I et al., respectfully submit this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at Doe v. Dept. of Pub. Safety, 271 F.3d 38 (2d Cir. 2001). Appendix A. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at Doe I v. Otte, 259 F.3d 979 (9th Cir. 2001). Appendix B.

STATUTORY PROVISIONS INVOLVED

The statutes relevant to the disposition of this case, Connecticut General Statutes §§ 54-250-261 (2001), and Alaska Statutes § 12.63.010-.100 and § 18.65.87 (Lexis L. Publg. 2001) as set forth in Appendices C and D, respectfully.

STANDARD OF REVIEW

This Court reviews questions of law de novo. Elder v. Holloway, 510 U.S. 516 (1994).

STATEMENT OF THE CASE

Preliminary Statement

1. Connecticut Sex Offender Registry Act.

On February 22, 1999, Respondent John Doe filed suit alleging that Connecticut's sex offender registration act ("CT-SORA"), Connecticut General Statutes §§ 54-250-261 (2001), violates his Fourteenth Amendment right to procedural due process. (J.A. 24.) Respondent claims that the law requiring the registration and public disclosure of information concerning persons designated as "sex offenders" deprives him of a liberty interest, in this case, damage to his reputation combined with the alteration of his status under state law, without notice or an opportunity to be heard. (J.A. 24.) Respondent also sought to represent a class of similarly situated individuals based on the due process claim. (J.A. 24.) On behalf of the due process

class, the respondent sought declaratory and injunctive relief prohibiting Connecticut from enforcing CT-SORA. (J.A. 24.)

On November 14, 2000, the respondent filed an amended class action complaint in the United States District Court, District of Connecticut (the "district court") against the Commissioner of Public Safety, the Director of the Office of Adult Probation and the Commissioner of Corrections (collectively, "petitioners"). (J.A. 1.)

On March 31, 2001, the district court found that CT-SORA violated the Fourteenth Amendment and granted the respondent's motion for summary judgment. (J.A. 51.)

On May 18, 2001, the district court ordered that the petitioners be permanently enjoined from publicly disseminating registry information concerning a member of the due process class, provided that law enforcement agencies should have access to the information in order to carry out their official duties. (J.A. 56.) Additionally, the district court granted the respondent's motion to certify the class of all persons who are subject to the registration and public disclosure requirements without notice and an opportunity to be heard. (J.A. 56.)

On May 18, 2001, the defendants appealed to the United States Court of Appeals for the Second Circuit (the "Second Circuit"). (J.A. 73.) On October 19, 2001, the district court's ruling was affirmed by the Second Circuit. (J.A. 20.)

The petition for writ of certiorari to the Second Circuit was granted by this Court on May 20, 2002. (J.A. 108.)

2. Alaska Sex Offender Registration Act.

On June 3, 1994, John Doe I, John Doe II, and Jane Doe I (collectively, "respondents") filed suit in the United States District Court of Alaska against the Alaska state commissioner for public safety and the state attorney general. The suit was filed under 42 U.S.C. § 1983 to enjoin

the enforcement of the Alaska Sex Offender Registration Act ("ASORA"). (J.A. 109, 212.) Respondents sought leave to use pseudonyms for the case. (J.A. 213.) The district court judge denied respondent's request. (J.A. 213.) After respondents refused to amend the complaint to include their real names, the district court dismissed their complaint. (J.A. 213.) Respondents appealed the dismissal, and the Ninth Circuit granted respondent's motion, allowing them to use pseudonyms. (J.A. 213.)

On remand again to the district court, the parties filed cross-motions for summary judgment on the ex post facto claim. (J.A. 213.) On March 31, 1999, a different district court judge granted the state's motion for summary judgment. (J.A. 213.) Respondents appealed the decision. (J.A. 213.) On April 9, 2001, the Ninth Circuit reversed and remanded the decision of the district court, holding that ASORA violated the Ex Post Facto Clause of the United States Constitution. (J.A. 209.) Petitioners then filed a petition for certiorari on November 21, 2001, which this Court granted on February 19, 2002. (J.A. 229.)

On August 23, 2002, this Court ordered this case to be consolidated for briefing with Conn. Dept. of Pub. Safety v. Doe, 271 F. 3d 38 (2d Cir. 2001). (J.A. 230.)

Statement of Facts

1. Connecticut Sex Offender Registration Act.

Respondent is a Connecticut resident who has been convicted of an offense that subjects him to the registration and notification requirements of CT-SORA. (J.A. 3.) He alleges that he "is not a dangerous sexual offender and does not pose a threat of safety to the community." (J.A. 2.) Respondent represents a class defined as "all persons who are subject to the registration and public disclosure requirements" of CT-SORA without notice and an opportunity to be heard on the question of whether they are currently dangerous. (J.A. 84.)

The petitioners are the directors or commissioners of Connecticut agencies responsible for the administration of CT-SORA. (J.A. 3-4.)

In 1999, the Connecticut legislature enacted Connecticut General Statutes §§ 54-261, known as the Connecticut Sex Offender Registration Act ("CT-SORA"). (J.A. 81.) Under CT-SORA, persons convicted of certain sexual offenses must register with the Commissioner of Public Safety ("Commissioner") within three days of their release into the community. (J.A. 82.) All registrants must provide their name, address, criminal history record, fingerprints, a photograph, a description of other identifying characteristics of the person, such as scars or tattoos, and a blood sample for DNA analysis, which must be verified once a year. (J.A. 82.)

If the registrant moves, he or she must notify the Commissioner of the new address in writing within five days. (J.A. 82.) Furthermore, if the offender regularly travels or temporarily resides in another state, he must register with the responsible agency in that state and comply with any additional duties that state imposes on sexual offenders. (J.A. 82.) Failure to comply with CT-SORA's requirements is a felony, punishable by up to five years in prison. (J.A. 83.)

Offenders who committed a violent sexual offense or committed a second nonviolent offense against a minor are required to maintain their registrations for life. (J.A. 82.) This group of offenders must complete and return address verification forms every ninety days. (J.A. 82.) Persons convicted for the first time of an offense against a minor, for a nonviolent sexual offense, or for committing a felony for a sexual purpose are required to maintain their registration for ten years. (J.A. 82.) These offenders must complete and return address verification forms annually within ten days of receipt. (J.A. 82.)

The Department of Public Safety ("DPS") is required under CT-SORA to maintain a central registry of the information given by sex offenders and to provide it to law enforcement

agencies and to the public. (J.A. 83.) The DPS is required to have the registry information available on the internet, which permits any person visiting the website to view the registrant's information. (J.A. 83.) The dissemination of the registry information is accompanied by the warning that "[a]ny person who uses information in this registry to injure, harass, or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution." (J.A. 83.)

No agency conducts an assessment of the threat to public safety an individual may pose when deciding whether he or she is required to register under CT-SORA. (J.A. 84.)

2. The Ex Post Facto Claim Under the Alaska Sex Offender Registration Act.

In 1985, respondent John Doe I ("Doe I"), a resident of Alaska, was convicted of sexual abuse of a minor. (J.A. 212.) After being released from prison in 1990, Doe I was granted custody of his daughter. (J.A. 212.) This grant of custody was based on a court's determination that he had been successfully rehabilitated. (J.A. 212.) Respondent Jane Doe, the wife of Doe I, is a registered nurse in Alaska. (J.A. 212.) Respondent John Doe II ("Doe II") was convicted of one count of sexual abuse of a minor in 1984. (J.A. 213.) Doe II was released from prison in 1990 and subsequently completed a two-year program that treats sex offenders. (J.A. 213.)

On May 12, 1994 the Alaska Legislature enacted ASORA. (J.A. 212.) ASORA has two main components. (J.A. 213.) First, ASORA requires convicted sex offenders to register with law enforcement authorities. (J.A. 213.) Persons convicted of "aggravated" sex offenses as defined in the statute must register with law enforcement authorities four times each year for life. (J.A. 213.) Those convicted of other sex offenses must register in person annually for fifteen years. (J.A. 213.) Those registering must be photographed, provide fingerprints, as well as provide their name, address, date of birth, and place of employment. (J.A. 213.) Additionally,

they must provide information about their conviction, including the specific crime and the date and place of the conviction. (J.A. 213.)

Second, ASORA authorizes full disclosure of information about all sex offenders to the public. (J.A. 213.) To fulfill this goal, information collected under ASORA is forwarded to the Alaska Department of Public Safety, which maintains a central registry of Alaska's sex offenders. (J.A. 213.) The Department of Public Safety has published this collected information on its website, allowing world-wide access to it. (J.A. 214.) The website includes an offender's name, street address, zip code or city, photograph, physical description, employer address and conviction information. (J.A. 214.) This information is displayed under a title which states, "Registered Sex Offender." (J.A. 214.)

SUMMARY OF ARGUMENT

1. Connecticut Sex Offender Registry Act.

This case involves the issue of whether CT-SORA violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Due Process Clause provides that no state can "deprive any person of life, liberty, or property, without due process of law." In order to prevail on a Due Process Claim, respondent must show that CT-SORA deprives him or her of a constitutionally protected liberty interest and that the procedures attending the deprivation are inadequate. Under the "stigma plus" test articulated in Paul v. Davis, CT-SORA implicates a protected liberty interest. CT-SORA's registry imposes a false stigma on non-dangerous registrants by implying that all registrants are a threat to the public. This false stigma is aggravated by unlimited public dissemination of the registry information. Additionally, the many burdensome registration requirements alter the legal status of the registrants and constitute a "plus" factor. The deprivation of the registrant's right to control the dissemination of personal

information is also a "plus" factor. Most importantly, there are insufficient due process procedures in place under CT-SORA. In fact, under CT-SORA, there are no procedural safeguards in place at all. Registrants have no opportunity to be heard before being subjected to the registration and dissemination requirements under CT-SORA. Therefore, because the registrants are deprived of a protected liberty interest without an opportunity to be heard, CT-SORA as enacted violates the Due Process Clause and should be held unconstitutional.

2. Alaska Sex Offender Registry Act.

This case involves the issue of whether ASORA violates the Ex Post Facto Clause of the United States Constitution with respect to parties whose crimes were committed before its enactment. The Ex Post Facto Clause prohibits states from enacting any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed." Calder v. Bull, 3 U.S. 386, 391 (1798). ASORA violates the Ex Post Facto Clause because it retroactively imposes a punishment in excess of that which sex offenders have already served. The Ninth Circuit noted that ASORA is clearly retroactive since it came into effect after the conviction of respondents. Doe v. Otte, 259 F.3d 979, 985 (9th Cir. 2001). ASORA constitutes a punitive statute because its extensive registration and notification provisions go far beyond that which is needed to protect the safety of Alaska citizens and result in an unwarranted and unconstitutional punishment on former sex offenders.

The Ex Post Facto Clause serves two purposes: it requires fair notice and it acts to restrain arbitrary and potentially vindictive legislation. Weaver v. Graham, 450 U.S. 24, 29 (1981). First, ASORA contravenes these twin purposes by not giving fair notice to defendants who were convicted before the statute was in place that they will be punished again once released from prison. Second, and even more important, ASORA creates a heavy burden on

defendants through registration and notification provisions that force offenders to report often to law enforcement officials and to have their personal information disseminated to a world-wide audience.

Sex offender registration statutes have survived ex post facto challenges in other states. However, none of these statutes was as extensive and burdensome as the Alaska statute. In contrast to the other state statutes, Alaska's statute demands a long and onerous period of registration as well as an unrestricted notification procedure whereby a sex offender's information is available to nearly any person, regardless of their need for the information. As the Ninth Circuit notes, "[w]ith only one exception, every sex offender registration and notification law that has been upheld by a federal court of appeals has tailored the provisions of the statute to the risk posed by the offender." Otte, 259 F.3d at 992; see Cutshall v. Sundquist, 193 F.3d 466, 474 (6th Cir. 1999); Doe v. Pataki, 120 F.3d 1263, 1269-70 (2d Cir. 1997); E.B. v. Verniero, 119 F.3d 1077, 1098 (3d Cir. 1997). Alaska's registration and notification law fails to tailor its provisions to the needs of public safety. In the process, it imposes an unconstitutional punishment on respondents. ASORA must therefore be found unconstitutional.

ARGUMENT

I. THE CONNECTICUT SEX OFFENDER REGISTRATION ACT VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION BECAUSE IT VIOLATES RESPONDENT'S PROTECTED LIBERTY INTERESTS WITHOUT AN OPPORTUNITY TO BE HEARD.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In order to prevail on a due process claim, a plaintiff must demonstrate that 1) the statute deprives him or her of a constitutionally protected liberty interest; and 2) the procedures

attending the deprivation are inadequate. Ky. Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

A. CT-SORA Deprives Sex Offender Registrants of a Protected Liberty Interest Under the "Stigma Plus" Test.

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Wis. v. Constantineau, 400 U.S. 433, 437 (1971). This Court later clarified that reputational interests by themselves are not "liberty" interests within the meaning of the due process clause; there must be a "tangible interest" in order for the protection of due process to be triggered. Paul v. Davis, 424 U.S. 693, 712 (1976). The additional factors, this Court reasoned, were necessary so that there would not be an inundation of litigation for legitimate government acts that might impact an individual's reputation. Id. at 701. Therefore, under the "stigma plus" test set forth by this Court, in order to establish a protected liberty interest the plaintiff must show 1) a false statement was made about him or her that is defamatory enough to injure reputation, or in other words, a "false stigma," in addition to 2) a "plus" factor, which is a tangible and material state-imposed burden or alteration of legal status. Id. at 701-02, 710-11.

1. The Undifferentiated Nature of the CT-SORA Registry Imposes a False Stigma on Non-Dangerous Registrants, Which is Aggravated by Unlimited Public Dissemination of the Registry Information.

Although this Court has not yet addressed the issue of implied stigma under the circumstances of the case below, this Court has held that a protected liberty interest of a government employee is implicated when the government terminates the employment based on accusations "that might seriously damage his standing and associations in his community" or that might impose "on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employments opportunities." Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972); see

Brandt v. Bd. of Co-op Educ. Servs., 820 F.2d 41, 43 (2d Cir. 1987). If the likelihood of harmful disclosure is high, a plaintiff need not wait until he or she is actually harmed in order to claim that a protected liberty interest has been implicated by the government action. Id.

Additionally, a plaintiff needs only to allege, not prove, that the statement is false in order to establish the deprivation of a due process right when there is no opportunity given for a "name-clearing hearing." Id.; see Codd v. Velger, 429 U.S. 624, 627 (1977). Indeed, the "truth or falsity of the charges would then be determined at the hearing itself." Id.

Numerous cases dealing with sex offender registration statutes hold that the "widespread dissemination of . . . information [contained in the registry] is likely to carry with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence" qualifies as a stigma imposed on the registrants by the government under the "stigma plus" test. Doe v. Pataki, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998); see E.B. v. Verniero, 119 F.3d 1077, 1102 (3d Cir. 1997); Doe v. Sex Offender Registry Bd., 428 Mass. 90, 101 (1998); Doe v. Atty. Gen., 426 Mass. 136, 159 (1997); W.P. v. Portiz, 931 F. Supp. 1199, 1219 (D.N.J. 1996); Doe v. Williams, 167 F. Supp. 2d 45, 55 (D.D.C. 2001).

Here, the Connecticut Sex Offender Registry Act ("CT-SORA"), otherwise known as Connecticut's enactment of "Megan's Law," implies a false stigma on non-dangerous registrants, thereby satisfying the "stigma" portion of the test under Paul. The publicly-disclosed CT-SORA registry does not differentiate between dangerous and non-dangerous sex offenders. Because the legislative goal of the registry is to promote public safety by disclosing the identity of sex offenders who may be a threat to the community, the undifferentiated nature of the registry implies that some of the registrants are currently dangerous, imposing a false stigma on individuals who allege that they are not. Even the disclaimer on the registry's website, by

declaring that no determination has been made of any individual's current dangerousness, implies that some registrants may be currently dangerous.

The charge by the government that every listed CT-SORA registrant might be a repeat sex offender who is a current threat to society certainly qualifies as a stigma in that such a designation seriously damages the reputation of the individual, who might otherwise be a reformed and upstanding member of the community. The implication of dangerousness could also foreclose work and housing opportunities and lead to physical harm by vigilantes. See e.g. Alex B. Eyssen, Student Author, Does Community Notification for Sex Offenders Violate the Eighth Amendment Prohibition Against Cruel and Unusual Punishment? A Focus of Vigilantism From "Megan's Law", 33 St. Mary's L.J. 101, 134-35 (2001). Moreover, this detrimental stigma continues either for ten years or for the lifetime of the registrant, depending on the offense committed, under the registration and dissemination requirements under CT-SORA. Conn. Gen. Stat. §§ 54-251(a), 54-253(a), 54-254(a), 54-257(c). Under the case law above, respondents need not wait before being actually harmed in such a way in order to state a protected liberty interest. Moreover, because CT-CORA provides no opportunity for a "name-clearing hearing" in order to avoid the stigma imposed by the government, registrants need only to allege, not prove, that they are not a current threat to the public in order establish the deprivation of a due process right.

It is important to note that if this Court were to uphold the Second Circuit and enjoin Connecticut from enforcing CT-SORA, this Court would not be ruling against the dissemination of truthful information. Unless each sex offender on the registry might be currently dangerous, as implied by the undifferentiated nature of CT-SORA, then the information is not truthful as to those not currently dangerous to the public.

Moreover, the false stigma imposed by the government on allegedly non-dangerous registrants is aggravated by unlimited public dissemination of the registry information. See e.g. Jane A. Small, Student Author, Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws, 74 N.Y.U. L. Rev. 1451, 1491-92 (Nov. 1999). The dissemination requirements of CT-SORA which demand the registry be available at all times via the internet are overly extensive. The legislative intent of CT-SORA is to protect vulnerable Connecticut citizens. However, under CT-SORA, any person in the world can view the listed information, not just concerned members of the community put at possible risk by being proximate to a former sex offender. The goal of the legislature would still be served by much less wide-spread and more controlled dissemination of information about those judged to be particularly likely to re-offend after a hearing on the subject had been held. Furthermore, the law enforcement function would still be served in that the registry information could continue to be used for purposes of protecting the public by investigating specific crimes.

Under CT-SORA, the government is implying a very damaging stigma on all registrants due to the undifferentiated nature of the listing, a stigma which the respondents claim to be false as applied to them. Because there is no opportunity for the false stigma to be cleared, respondents need only to allege the stigma is false in order to state a protected liberty interest. Moreover, although a sex offender might have a damaged reputation due to his conviction, unlimited public disclosure under CT-SORA inflicts a greater stigma on the registrant than would result from conviction alone.

2. CT-SORA's Many and Lengthy Registration Requirements Alter the Legal Status of Registrants Which Constitutes a "Plus" Factor.

Numerous courts have found that multiple onerous and long-term registration requirements of sex offender registration acts similar to CT-SORA, which subject the registrant

to criminal prosecution if not complied with in full, alters the legal status of the registrants and therefore constitutes a "plus" factor under Paul. Doe v. Pataki, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998); see E.B. v. Verniero, 119 F.3d 1077, 1102 (3d Cir. 1997); Doe v. Sex Offender Registry Bd., 428 Mass. 90, 101 (1998); Doe v. Atty. Gen., 426 Mass. 136, 159 (1997); W.P. v. Portiz, 931 F. Supp. 1199, 1219 (D.N.J. 1996); Doe v. Williams, 167 F. Supp. 2d 45, 55 (D.D.C. 2001).

To illustrate, a district circuit held that three "plus" factors lead to the conclusion that Alabama's version of "Megan's Law" deprived the registrant of due process. Doe v. Pryor, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999). First, the court held as a "plus" factor the fact that the registrant no longer has the right to establish a new residence without giving prior notice to government officials, a right which the individual previously enjoyed. Id. Second, the registry, with its implication that the individual is likely a recidivist and a current danger to the public, could serve to foreclose prospective business and employment opportunities. Id. at 1232; see e.g. Doe v. Otte, 259 F.3d 979, 2001 (9th Cir. 2001). Third, the registry deprives the registrant of a legitimate privacy interest in his or her home address. Id. The district court reasoned that because this Court found in Wis. v. Constantineau that a state statute which deprived individuals considered to be a risk to their community of only one right, "the right to purchase or obtain liquor," Alabama's "Megan's Law" which deprived a registrant of many rights, was therefore sufficient to establish the "plus" factor of the "stigma plus" test. Id. at 1232; see Doe v. Pataki, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998).

The Alabama registration and dissemination statutes which have been held to violate due process in Pryor are very similar to CT-SORA. Both statutes require that a convicted sex offender must register a new residence. Ala. Code § 15-20-22(d) (1975); Conn. Gen. Stat. §§ 54-251(a), 54-252(a), 54-254(a). Both statutes imply a damaging stigma that the registrant is a

current threat to the public. Supra; Doe v. Pryor, 61 F. Supp. 2d. 1224, 1231 (M.D. Ala. 1999). Both statutes mandate the disclosure of registrant's home address. Ala. Code § 15-20-21(a)(2) (1975); Conn. Gen. Stat. §§ 54-251(a), 54-253(a), 54-254(a), 54-257(c). Both state statutes also demand that if any of requirements are not complied with felony prosecution of the registrant would ensue with few exceptions. Ala. Code § 15-20-24 (1975); Conn. Gen. Stat. §§ 54-251(d), 54-252(b), 54-253(c), 54-254(b). Because of the similarities, CT-SORA would violate due process under the reasoning of the Pryor court.

In the case below, the "plus" factor under Paul was satisfied in that the multitude of burdensome and lengthy registration duties imposed on the registrants under CT-SORA, failure of which subjects the convicted sex offender to felony prosecution, alters his or her status under state law. For example, with limited exceptions, an individual required to register because he or she was convicted of certain nonviolent sexual offenses must verify their address annually for ten years. Conn. Gen. Stat. §§ 54-251(a), 54-253(a), 54-254(a), 54-257(c). Those convicted of a sexually violent offense must do so every ninety days for the rest of his or her life. Id. If the individual fails to return the address verification form within ten days, the Department of Public Safety notifies the police and a warrant for their arrest is issued. Id. at § 54-257(c). If the individual changes addresses, he or she must notify the Commissioner of Public Safety (the "commissioner") within five days. Id. at §§ 54-251(a), 54-252(a), 54-254(a). Moreover, if the individual "regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling," he or she must notify the commissioner and register with the corresponding agency in the other state. Id. The individual must also provide blood samples for DNA analysis and must appear at a specified location to have his or her picture taken whenever requested by the commissioner, which is at least every

five years. Id. at §§ 54-250(3), 54-251(a), 54-252(a), 54-253(b),(c), 54-254(a), 54-257(d). The failure to comply with any of the above requirements under CT-SORA constitutes a felony punishable by up to five years in prison. Id. §§ 54-251(d), 54-252(b), 54-253(c), 54-254(b). These collective requirements under CT-SORA "easily qualify as a 'plus' factor under Paul." Doe v. Dept. of Pub. Safety, 271 F.3d 38, 57 (2d Cir. 2001).

The Second Circuit discarded the idea offered by the petitioners that the registration requirements under CT-SORA were merely "minimal burdens" similar to the inconvenience encountered when paying taxes or renewing a driver's license, calling the analogy "breathtaking." Id. at 59. Moreover, the "dispositive issue is neither the degree of burden inherent in the proffered 'plus' factor nor the substantiality of the interest, right or status affected thereby" but simply when the action is governmental in nature and not trivial, the "plus" factor is satisfied and the constitutional protection under the Due Process Clause is triggered. Id.

Although the desire of the Connecticut legislature to protect the public by disseminating information about dangerous sex offenders is admirable, as the Second Circuit held, CT-SORA is "too blunt to achieve that end properly." Id. at 41. Because CT-SORA results in a government-imposed false stigma on registrants, in addition to altering registrant's legal status under state law, the registrants are deprived of a protected liberty interest under the "stigma plus" test.

3. The Right to Privacy is Also a Protected Liberty Interest Which is Violated by CT-SORA.

This Court has implied in situations analogous to the one at bar that the right to privacy of personal information is a protected liberty interest requiring due process protections. In determining whether the Freedom of Information Act authorized access of rap sheets to the public, this Court found a "vast difference between the public records that might be found after a

diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information," and concluded that "the compilation of otherwise hard-to-obtain information altered the privacy interest implicated by the disclosure of that information." U.S. Dept. of J. v. Rptrs. Comm. for Freedom of the Press, 489 U.S. 749, 763-64 (1989). Moreover, this Court has stated that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." U.S. Dept. of Def. v. Fed. Lab. Rel. Auth., 510 U.S. 487, 500 (1993). This Court has also held that individuals have a "nontrivial privacy interest" in nondisclosure of their home addresses in certain situations. Id. at 501.

Here, the rap sheet containing personal information in Rptrs. Comm. for Freedom of the Press is similar to the compilation of personal information required under CT-SORA. Although a home address may be in the phone book and the registrant's physical appearance is obviously visible to the public, the registrant still has an interest in controlling the dissemination of personal information when compiled in registry and made available to the public at large, especially when such information has an adverse impact on the registrant's reputation, housing and employment opportunities, and even subjects the registrant to physical danger.

A few courts have found that a protected liberty interest has been violated by state enactments of "Megan's Law" similar to CT-SORA by relying on the right to privacy rather than the statutory registry obligations imposed on registrants. Roe v. Farwell, 999 F. Supp. 174, 196 (D. Mass. 1998); see Doe v. Portiz, 142 N.J. 1, 17 (1995). Other courts acknowledge that a constitutional right to privacy in the nondisclosure of personal information is questionable, but note that the disclosure of the information in combination with the false stigma is sufficient to

trigger due process protections. Doe v. Pryor, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999); see Doe v. Atty. Gen., 426 Mass. 136, 144 (1997). Therefore, these courts have reasoned that they do not need to determine whether the right to privacy alone would implicate a constitutionally protected liberty interest. See supra.

Similarly, in the case at hand, this Court need not determine whether the registrants under CT-SORA have a constitutionally protected privacy interest in controlling the dissemination of their personal information to the world via the internet. It is enough to acknowledge that such a right is an additional "plus" factor, which when taken together with the statutory registration requirements, implicates a protected liberty interest.

Other courts who have not found a protected liberty interest under similar state sex offender registration and dissemination provisions did not disagree with the argument that the ongoing legal obligations of registrants constitutes a "plus" factor. For example, the Sixth Circuit held that Tennessee's version of "Megan's Law" did not implicate due process protections, finding that the right to privacy and employment, without more, was not sufficient. Cutshall v. Sundquist, 193 F.3d 474, 479-82 (6th Cir. 1999). However, the court did not seem to address or consider whether the many burdens of registration under the Tennessee provisions constituted a sufficient "plus" factor. If the court had taken into account the precedent set by many other jurisdictions and considered the numerous registration demands, it seems likely that a protected liberty interest would have been found.

Registrants under CT-SORA have been deprived of a constitutionally protected liberty interest under two theories. First, CT-SORA violates a protected liberty interest due to the unlimited dissemination of personal information and many lengthy registration burdens, failure of which subject the registrant to felony prosecution. Secondly, CT-SORA violates a protected

liberty interest because it imposes on the registrant's right to control personal information, at least when taken into account with the ongoing registration requirements. Because CT-SORA deprives the registrants of a protected liberty interest, the registrants are entitled to adequate procedural due process.

B. The Procedures Attending the Deprivation of the Protected Liberty Interest Caused by CT-SORA are Inadequate Under the Due Process Clause.

Due process is "flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 483 (1972). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). To determine whether sufficient procedures exist to satisfy procedural due process, this Court has established a three-prong balancing test in which the reviewing court must examine (1) the private interest affected by the governmental action; (2) the risk of error inherent in the procedure employed, along with the probable value of any additional or different safeguard; and (3) the government's interest, including any fiscal or administrative burdens involved in providing substituted or additional procedures. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The Second Circuit did not elaborate on whether the procedures under CT-SORA were adequate, presumably because Connecticut has no safe-guarding procedures in place. Under CT-SORA, a person subject to the requirements is not allowed an opportunity to be heard on the issue of whether he or she is dangerous to public safety before requiring that person to register and disclosing the personal information about him or her to the world through multiple forms. Doe v. Dept. of Pub. Safety, 271 F.3d 38, 45 (2d Cir. 2001). Other courts have also concluded the issue here and held that similar enactments of "Megan's Law" were unconstitutional because they did not provide for due process, without further discussion of the Eldridge balancing factors.

See Doe v. Sex Offender Registry Bd., 428 Mass. 90, 101 (1998); Doe v. Atty. Gen., 426 Mass. 136, 159 (1997). However, the Eldridge factors expound on why the lack of due process procedures under CT-SORA is unconstitutional.

1. The Private Interests of the Sex Offender Registrants are Numerous and Strong.

"[T]he possible length of wrongful deprivation . . . is an important factor in assessing the impact of official action on the private interests." Fusari v. Steinberg, 419 U.S. 379, 389 (1975).

The registrant's private interests are significantly affected by CT-SORA's registration requirements and community notification. See supra. CT-SORA's provisions impact the registrant's reputation, employment and housing opportunities, and ability to control the disclosure of a multitude of personal information. Additionally, these interests are affected for several years, if not life. Therefore, the private interests of the sex offender registrants are strong.

2. The Risk of Erroneous Deprivation of the Private Interests of Registrants is High.

Sex offenses that require a convicted offender to register encompass a variety of very different types of conduct, ranging from sexual experimentation, consensual activity among underage peers, to violent and repeated sexual assault. The Massachusetts Supreme Court held that the state's intent to protect children from currently dangerous sex offenders was not sufficient to warrant automatic registration of every person convicted because there are situations where the risk of re-offense was minimal and therefore the present danger to children was not significant. Doe v. Atty. Gen., 426 Mass. 136, 139 (1997). The court implied that because there are situations in which automatic registration provisions apply regardless of current

dangerousness, unless an opportunity to be heard on the issue is provided, the risk of erroneous deprivation is too great for the statute to be constitutional.

Likewise, the undifferentiated nature of CT-SORA carries a high risk of error in that there is no opportunity to challenge the designation of being a currently dangerous sex offender who has a high likelihood of repeat offenses. A seventeen year old who has consensual sex or other experimental sexual touching with a fifteen year old and is convicted for sexual assault against a minor may be lumped into the same category as a repeat child molester under CT-SORA and other unclassified state enactments of "Megan's Law," although it can hardly be argued that the two registrants are of the same threat to the community or carry the same chance of recidivism. See e.g. Stephen R. McAllister, Student Author, Megan's Laws: Wise Public Policy or Ill-Considered Public Folly?, Kan. J.L. & Pub. Poly. 1, 20 (1998). Even "Megan's Law" enactments which classify a convicted sex offender to levels dependent on the crime originally committed carries a high risk of erroneous deprivation of private interests unless an opportunity to be heard on the subject of current dangerousness and the individual's probability of recidivism is considered.

Taking into account the strong private interests and high risk of erroneous deprivation of such interests, due process requires the opportunity to be heard and to challenge to designation as a currently dangerous sex offender, subject to the third Eldridge factor.

3. There is No Substantial State Interest in Notifying the Public of Non-Dangerous Registrants.

Connecticut has an interest in protecting its citizens from dangerous convicted sexual offenders by requiring the dissemination of information about them. Connecticut also has an interest in ensuring that CT-SORA is disseminating fair and accurate information by employing a fair and accurate procedure under which the legislative intent is best served. Several courts

have held that "the state has no substantial interest in notifying persons who will not come into contact with the registrant." E.B. v. Verniero, 119 F.3d 1077, 1107 (3d Cir. 1997); see Doe v. Atty. Gen., 426 Mass. 136, 142 (1997); State v. Ward, 123 Wash. 2d 488, 503 (1994). Therefore, Connecticut has no interest in notifying the public of individuals who are not likely to come into contact with the members of the community in order to commit sex offenses because they are not likely to repeat a sex offense. Additionally, Connecticut has no interest in the dissemination of information about those classified as dangerous sex offenders outside the area in which the offender is located because the offender is not likely to come into contact with persons outside of the county in which he works and resides. This means that Connecticut has no interest in public dissemination of registry information via the internet, which can be viewed by an unlimited number of people outside Connecticut.

4. State Interests Cannot Excuse the Lack of Adequate Due Process Procedures in CT-SORA.

This Court has acknowledged that "it is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." U.S. v. Rabinowitz, 339 U.S. 56, 69 (1950). Moreover, this Court in its decision to strike provisions of a statute intended to rid the internet of obscenity reasoned that the understandable goal of protecting children must not sweep away constitutional protections. Reno v. ACLU, 521 U.S. 844, 875 (1997). Basic constitutional rights impose burdens on all Americans, however, "we remain free people only so long as we accept those burdens, even in the face of the very safety of our children." E.B. v. Verniero, 119 F.3d 1077, 1128 (3d Cir. 1997).

In cases deciding the adequacy of due process procedures under a state-enacted "Megan's Law" similar to CT-SORA, courts have held that

> while the government unquestionably has a valid and laudable interest in protecting the public, and in particular our youth, from being victimized, the beneficence of its aims do not excuse it from affording to the offenders subject to the statute the due process protections to which they are entitled under the Constitution.

Doe v. Williams, 167 F. Supp. 2d 45, 59 (D.D.C. 2001). See also Doe v. Pryor, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999).

The Massachusetts Supreme Court went so far as to say that "to require registration of persons not in connection with any particular activity asserts a relationship between the government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government." Doe v. Atty. Gen., 426 Mass. 136, 137 (1997). The court held that in order for an individual to be forced to comply with the registration and dissemination provisions of the "Megan's Law" statute as enacted, the state agency responsible must first show compelling evidence that the registrant has a high likelihood of re-offense. Id. at 146. Furthermore, the court reasoned that due process may require the opportunity for the convicted sex offender to show that for some reason, such as a long passage of time without re-offense, that he or she should be exempted from some or all regulations. Id.

Similarly, some of the registrants under CT-SORA are admittedly not "nice people," however they are still entitled to due process under the Constitution. Although the goal of the Connecticut legislature, to protect citizens from dangerous sex offenders, is compelling and there are benefits of having information regarding such individuals disseminated to the public, enactments such as CT-SORA must not be able to displace basic constitutional protections, such as the opportunity to be heard. See e.g. Michele L. Earl-Hubbard, Student Author, The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990's, 90 Nw. U. L. Rev. 788, 861-62 (1996).

Requiring due process procedures could be somewhat burdensome on Connecticut, however any burden would be justified by ensuring that the registration and dissemination system under CT-SORA was accurate and just. Unless Connecticut provides registrants with an opportunity to be heard on the issue of current dangerousness and likelihood of recidivism, it will continue to act much like a "totalitarian government."

II. THE ALASKA SEX OFFENDER REGISTRATION ACT VIOLATES THE EX POST FACTO CLAUSE OF THE CONSTITUTION BECAUSE IT PUNISHES RESPONDENTS FOR ACTS THEY COMMITTED BEFORE THE STATUTE WAS IN PLACE.

In analyzing whether a retroactively applicable law is subject to the Ex Post Facto clause, the question is whether the law "increases the penalty by which a crime is punishable." Cal. Dept. of Corr. v. Morales, 514 U.S. 499, 506 (1995). Determining whether a statute is punitive requires a two-step inquiry, called the "intent-effects test." U.S. v. Ursury, 518 U.S. 267, 278 (1996). First, the intent of the legislature (either expressed or implied) must be considered. U.S. v. Ward, 448 U.S. 242, 248 (1980). If the legislature's intent is punitive, the statute must be struck down. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963). If the legislature's intent is not punitive or is ambiguous, the next step is to ask whether the statute is "so punitive either in purpose or effect" that it should be considered punitive despite the legislative intent. Ward, 448 U.S. at 249.

A. The Intent of the Alaska Sex Offender Registration Act is Punitive Because It Requires Extensive Registration Requirements and is Listed in the State's Criminal Code.

In order to determine the legislative intent behind a statute, one must look to the legislative history and the design of a statute. Ward, 448 U.S. at 249. ASORA's intent, as evidenced by these factors, is punitive.

1. The Legislative History of ASORA Demonstrates a Punitive Intent.

First, the legislative history indicates a punitive intent. ASORA was passed amid a perceived "crisis" by the state legislature concerning sex offenders. Sex offender statutes that have been passed as a result of a "crisis" have indications that the legislature intended to punish sex offenders. For example, in passing New York's sex offender statute, one legislator stated that by passing the law, "[w]e are coming out to get them." Doe v. Pataki, 940 F. Supp. 603, 604-05 (S.D. N.Y. 1996). Another said, "I think that one of the results of this legislation might be that this guy is going to go out of town, out of state, and that's very good for us." Id. In contrast to New York, there are no such public minutes available from Alaska's passage of ASORA. As a result, the true feelings of Alaska's legislation may be somewhat hidden. The statements by the legislators above demonstrate that public safety may not be the first priority of the state legislatures. Additionally, public safety may not be a mutually exclusive goal from punishment. Like New York, Alaska passed ASORA amid public outrage at sex offenders. One can therefore infer that even though ASORA might have been enacted to serve public safety, the legislature also wished to punish sex offenders.

An example of Alaska's punitive intent is placement of ASORA's registration provisions in the state's criminal code. Placement of these provisions in the state's criminal procedure code implies that the provision is a punishment or, at the very least, associates ASORA with punishment in the minds of the average citizen. This placement of ASORA demonstrates a punitive intent.

2. The Design of ASORA Indicates a Punitive Intent.

The design of ASORA also indicates a punitive intent. For example, ASORA requires a sex offender to register quarterly in some instances, creating a great burden on their time and

energy. Doe v. Otte, No. A94-0206-CV (Alaska Dist. Ct. March 31, 1999). Additionally, the district court explained that the information required of ASORA is more burdensome than that required by the Washington sex offender statute upheld by the Ninth Circuit in Russell v. Gregoire. Id. For instance, the statute requires periodic reporting, notices of changes in employment or living condition, and various other pieces of personal information. Id. Also, the length of registration (a lifetime for those convicted of "aggravated" sex offenses) is excessive in relation to the amount of danger posed. ASORA, then, is essentially a form of post confinement supervision administered by a criminal justice agency (state troopers). The fact that ASORA's provisions are enforced by a criminal agency is further proof of a punitive legislative intent. One can infer from the length and breadth of the registration and notification requirements that the legislature's intent was punitive because these requirements are out of proportion in scope to the needs of public safety. Therefore, while the legislature may have intended to provide for public safety, it also intended to punish sex offenders.

B. The Effect of the Alaska Sex Offender Registration Act is Punitive Because Its Extensive Registration and Notification Requirements Serve as Punishment When Considering the Seven Mendoza-Martinez Factors.

Even if the legislative intent is found to be non-punitive or ambiguous, the effect of ASORA is still so punitive as to render it unconstitutional. In determining whether a statute is punitive in effect, seven factors are considered:

> 1. Whether a statute involves an affirmative disability or restraint; 2. Whether it has historically been regarded as a punishment; 3. Whether it comes into play only on a finding of scienter; 4. Whether its operation will promote the traditional aims of punishment – retribution and deterrence; 5. Whether the behavior to which it applies is already a crime; 6. Whether an alternative purpose to which it may rationally be

connected is assignable to it; and 7. Whether it appears excessive in relation to the alternative purpose assigned.

Mendoza-Martinez, 372 U.S. at 168-69. The Court may "reject the legislature's manifest intent" and treat a statute as punitive "only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention." Kan. v. Hendricks, 521 U.S. 346, 361 (1997). Review of the seven Mendoza-Martinez factors demonstrates that the statute is punitive in effect by the "clearest proof."

1. ASORA Imposes an Affirmative Disability or Restraint on Respondents.

ASORA imposes an affirmative disability on respondents in two ways. First, as the Ninth Circuit explained, ASORA imposes constant and "onerous" registration conditions on offenders that "in some respects are similar to probation or supervised release." Otte, 259 F.3d at 987. For instance, a sex offender whose conviction is not for an "aggravated" offense and has only one conviction must register annually for 15 years. Alaska Stat. § 12.63.020(a)(2) (Lexis L. Publg. 2001). However, offenders such as respondents who have one conviction for an "aggravated" offense must re-register quarterly every year for the rest of their lives. Id. at § 12.63.020(a)(1). The offender must disclose a wide variety of personal information, such as their address, vehicle information, and information concerning any mental health treatment they have received. Id. at § 12.63.010(b)(1-2). Such requirements impose an affirmative disability on respondents because the frequency and extensiveness of the registration disrupts their ability to lead normal lives and consumes much of their attention every year.

Second, ASORA imposes an affirmative disability on respondents through its notification provisions. The notification provisions, by allowing unrestricted access by the public to the names and information of sex offenders, opens them up for public scorn that cause irreparable

harm to their personal and professional lives. Otte, 259 F.3d at 987. In reviewing a Kansas sex offender law that allowed unrestricted access by the public (like ASORA), the Kansas Supreme Court found that the law imposed an affirmative disability. Kan. v. Myers, 260 Kan. 669, 696 (1996). The court reasoned that "[t]he practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment." Id. In Myers, the defendant noted that the statute "has caused me more problems than going to prison. I was evicted from my mother's apartment; left me virtually homeless. I had nowhere to go." Id. at 673. Myers went on to add that, "I have no money. I don't know what I'm going to do. At least in prison I knew I had a place to sleep. I would rather go back to prison." Id. at 674. In Myers, then, unrestricted notification had the effect of completely ostracizing the defendant from the community to the point where obtaining the basic needs of life became extremely difficult. Because ASORA allows unrestricted access to information like the Kansas statute, one can infer that sex offenders in Alaska will face these same obstacles. The Ninth Circuit argued that unrestricted notification "creates a substantial probability that registrants will not be able to find work, because employers will not want to risk loss of business when the public learns that they have hired sex offenders." Otte, 259 F.3d at 988. Inability to obtain employment or housing due to unrestricted public notification constitutes an affirmative disability because a place to work and sleep is so central to a person's life. A sex offender should not have to face homelessness and bankruptcy as was the case in Myers because of a crime they committed in the past.

Additionally, notification leads to vigilantism on sex offenders by members of the community. For example, Carlos Diaz, a convicted sex offender in New Jersey, was forced out of his mother's residence where he was living when a crowd of news vans, reporters, and Guardian Angels surrounded Diaz's residence around the clock. Pataki, 940 F. Supp. at 627.

"Wanted" posters were placed around the neighborhood and threats were made against Diaz and his family. Id. Local politicians and other leaders also condemned him. Id. Eventually, Diaz's mother also left the community. Id. Alan Kabat also notes a number of examples of vigilantism occurring in different states, some of which were cases of mistaken identity resulting in injuries to innocent third parties. Alan Kabat, Student Author, Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake, 35 Am. Crim. L. Rev. 333, 340 (Winter 1998). Such vigilantism might be an unavoidable and acceptable result under limited notification. However, unlimited notification will likely both increase the threat and amount of vigilantism while at the same time not necessarily achieving ASORA's goal of public safety. As demonstrated above, such vigilantism is no small concern. To the contrary, it can result in extreme harm to sex offenders who have already served their time. The lives of sex offenders can be completely disrupted, interfering with their ability to re-enter society. It can also result in harm to innocent third parties such as Mrs. Diaz, whose only "crime" was being the mother of a convicted sex offender. Because the statute's registration and notification provisions greatly interfere with an offender's ability to lead a normal life, they impose an affirmative disability.

2. Registration and Notification Provisions Such as ASORA Have Historically Been Regarded as Punishment.

The Supreme Court of Arizona, in analyzing Arizona's sex offender registration law, found that registration has traditionally been regarded as punishment. State v. Noble, 171 Ariz. 171, 176 (1992). In its reasoning, the Noble court relied on the opinion below which noted that the Arizona statute is a lifetime disability resulting in a "badge of infamy." State v. Noble, 167 Ariz. 440, 443 (Ariz. App. 1990) (citing Wis. v. Constantineau, 400 U.S. 433, 437 (1971) (where the posting of the name of an excessive drinker who was forbidden to drink alcohol for one year

constituted a "badge of infamy"). In another case involving sex offender registration, the Supreme Court of California described sex offender registration as an "ignominious badge." In re Birch, 10 Cal. 3d 314, 322 (1973). Finally, in defining "scarlet-letter punishment," Black's Law Dictionary uses the example, "he was also assessed the scarlet-letter punishment of having a sign – 'Convicted Child Molester Living Here' – posted in his front yard." Black's Law Dictionary 563 (Bryan A. Garner ed., pocket ed., West 1996). This example is meant to demonstrate a common usage of the phrase and therefore demonstrates the connection of sex offender registration and notification provisions to historical shaming punishments. As a result, ASORA can be considered analogous to these "scarlet letter" punishments. Although the government may not be directly "punishing" the offender in a public manner, the notification of a sex offender's status through a website accessible to millions of people has the same effect. That effect is to effectively banish offenders from communities that refuse to provide the offender with housing or employment or actively harass the offender. Therefore, ASORA acts as punishment through its connection to shaming punishments of the past.

3. Although ASORA's Requirements Do Not Come Into Effect Only Upon a Finding of Scienter, This Factor Should Be Given Little Weight.

Although ASORA's registration and notification requirements do not come into effect only on a finding of scienter, this factor should be given limited weight. Additionally, other Federal Circuit Courts have given this factor minimal or no weight. See Artway v. Atty. Gen. of the St. of N.J., 81 F.3d 1235 (3d Cir. 1996); Pataki, 120 F.3d at 1281. For instance, the Second Circuit in Pataki gave no treatment to scienter in its opinion. Id. The Ninth Circuit also gave limited weight to this factor. Otte, 259 F.3d at 994. The court noted that, "given that conviction of a serious criminal offense is a prerequisite to the application of the statute, we do not believe that this factor provides much support for the conclusion that the Act is not punitive." Id. Many

criminal laws today involve strict liability, where intent to commit the crime (scienter) is not a factor. In many cases, then, whether there is a finding of scienter will be irrelevant. As a result, a finding of scienter does not demonstrate as directly as the excessiveness or affirmative disability factors how ASORA acts as punishment. Therefore, minimal or no weight should be given to this factor.

4. ASORA's Operation Furthers the Traditional Aims of Punishment – Retribution and Deterrence.

ASORA clearly promotes the aim of deterrence because its main purpose is to prevent sex offenders from committing an offense again. The registration requirement serves this purpose by giving law enforcement officials information on offenders. The notification requirement achieves the aim of deterrence through notifying the public of a sex offender's existence and location. Additionally, the Ninth Circuit found Washington's sex offender statute to implicate deterrence though its requirements are substantially less than those of Alaska's. Russell v. Gregoire, 124 F.3d 1079, 1091 (9th Cir. 1997). One can infer from this ruling that Alaska's statue implicates deterrence as well.

Alaska's statute even more directly serves the aim of retribution against sex offenders for their past offense or offenses. ASORA is retributive because of the length and breadth of the registration requirements. For instance, the requirement that individuals convicted of "aggravated sex offenses" register in person quarterly is similar to the requirements imposed for probation or supervised release. Alaska Stat. § 12.63.010(d)(2). In finding that Kansas' statute had a retributive effect, the Myers court noted that the statute's provisions went beyond the need for public safety. Myers, 260 Kan. at 696. Here, like the Kansas statute, the provisions of ASORA are not tied only to protecting the public. The length of the requirement to report appears to differ based on the degree of wrongdoing and not on the risk of recidivism by the

offender. For instance, as noted before, "aggravated" sex offenders must register for life, while other offenders must register for 15 years. However, ASORA does not link the commission of "aggravated" sex offenses to a greater risk of recidivism. On the contrary, there is no explanation of why "aggravated" sex offenders are more likely to re-offend than "other" sex offenders. Therefore, the reason for an "aggravated" sex offender to register for life is not tied to the state's belief that they are a greater risk to re-offend. Instead, the state's reason for having the offender register longer is that their actions were more culpable in nature and that they should therefore be punished more harshly. A life-long registration requirement must necessarily implicate retribution because there is no system to review if offenders are still a threat. As a result, many former offenders will be forced to register not because they are a threat, but because the statute continues to demand it. Continued registration for offenders long past the time they committed an offense is clearly aimed at punishing them for the offense itself. Therefore, the registration requirement serves the goals of retribution and deterrence.

The notification requirement serves the goal of retribution as well. ASORA allows sex offender's information to be posted on a website and disseminated to the public. Alaska Stat. § 18.65.087 (Lexis L. Publg. 2001). However, this notification is made without reference to their risk to the pubic but instead appears to group all sex offenders together. A person convicted of an "aggravated" sex offense must presumably have their information posted through the notification provisions on a website for life. As a result, sex offenders may continue to suffer shame, humiliation, and the loss of opportunities long after they have committed the offense and served their time. Such a response to the commission of one offense impliedly if not explicitly demonstrates that ASORA serves as retribution for a past crime. ASORA therefore serves the

purpose of retribution because notification is not based on the risk of recidivism but on the fact of wrongdoing by the offenders.

5. The Behavior to Which ASORA Applies is Already a Crime.

ASORA applies only to those found guilty of a sexual offense. Alaska Stat. § 12.63.010. ASORA does not cover those found not guilty by reason of insanity or who were not convicted but for some reason need to be listed. Id. at § 12.63.100. In contrast, Washington's sex offender statute applies to offenders who were not found guilty of a crime as well as those who were found guilty. Russell, 124 F.3d at 1091. For instance, those found incompetent to stand trial or who committed as sexual psychopaths are still subject to the statute. Id. The Ninth Circuit argued that, "In Russell, the fact that the statute applied to Washington sex offenders who were not found guilty of a crime as well as to those who were convicted was central to our conclusion that the Washington act was not punitive." Otte, 259 F.3d at 991. ASORA does not contain these same provisions. Because ASORA applies only to behavior which is already a crime, it should be considered punitive.

6. Although There is a Non-Punitive Purpose Which Can Be Assigned to ASORA, the Statute is Excessive in Relation to this Non-Punitive Purpose.

ASORA does attempt to serve the purpose of public safety. However, this factor is intimately connected with the seventh Mendoza-Martinez factor since ASORA's measures must be not be excessive in relation to this non-punitive purpose. Therefore, although ASORA as a whole furthers public safety, its provisions are not reasonably tied to this goal.

The fact that respondents were convicted of one sex offense simply does not justify a registration requirement that continues, without the possibility of termination, for an entire lifetime. Respondents have already served time in jail. A further requirement of registration for

life is excessive given that they have already "paid their dues" to society. Theoretically and realistically, those convicted of one sex offense which the legislature Alaska labels as "aggravated" could have to report 4 times a year for 50, 60 or even 70 years. Such a result is not only unjustifiable in and of itself given that the offender only committed one crime but it is also not justifiable on the basis of public safety because Alaska has no mechanism for determining whether someone who has been registering for 40 years is still dangerous. Commentators have noted that as people age, they are less likely to re-offend. See Jane A. Small, Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws, 74 N.Y.U. L. Rev. 1451, 1455 (Nov. 1999). As a result, senior citizens who committed an "aggravated" sex offense in their 20's could be forced to register even though they pose no threat. Such an outcome is excessive in relation to the need for public safety.

Furthermore, such an excessive registration requirement on respondents does not square with the fact that an Alaska court determined that John Doe I had been successfully rehabilitated. Otte, 259 F.3d at 983. The court relied for its decision on the part of psychiatric evaluations that specifically concluded that John Doe I had "a very low risk of re-offending" and is "not a pedophile." Id. A lifetime registration requirement for an offender who has been successfully rehabilitated cannot, in the name of public safety, be justified.

The notification provisions of ASORA are also excessive in relation to the goal of public safety for two reasons. First, ASORA allows information about sex offenders to be available world-wide on the internet without any restrictions on who can access this information. Second, as noted earlier, this information is posted without regard to the risk of recidivism by the sex offender. It is possible, therefore, for people on the other side of the world to access this information despite the fact that their need for this information is very low (at best), given their

distance from the sex offender and the possibility that the offender may not even be dangerous. As the Ninth Circuit stated, "[b]roadcasting the information about all past sex offenders on the internet does not in any way limit its dissemination to those to whom the particular offender may be of concern." Otte, 259 F.3d at 992. Moreover, ASORA does not limit notification to those in the surrounding community who would be most concerned by the presence of a dangerous sex offender. The connection, then, between the notification provisions of ASORA and the goal of public safety suffers from faulty logic. The result is that offenders such as respondents needlessly suffer excessive punishment. There is no need to cause such disruption in a sex offender's life when it may not even be serving the needs of the community.

Other courts that have upheld sex offender notification statutes have only done so where the notification was restricted by being tailored to the goal of public safety. See Sundquist, 193 F.3d at 474; Pataki, 120 F.3d at 1269-70; Verniero, 119 F.3d at 1098; Gregoire, 124 F.3d at 1091; State v. Ward, 123 Wash. 2d 488, 502 (1994). For example, the Second Circuit, in upholding New York's sex offender statute, noted that the act provides for three levels of notification based on an assessment of the offender's risk of recidivism by a five-member Board of Examiners. Pataki, 120 F.3d at 1268. The New York act itself lists some guidelines on which risk of recidivism should be based, including criminal history, whether the offender is receiving counseling, whether the offender is of advanced age (thus making him less likely to re-offend), psychological evaluations demonstrating a risk of recidivism, and recent behavior or threats expressing an intent to re-offend. Id. Based on these procedural safeguards, the court stated that, "the extent of notification is carefully calibrated to, and depends solely upon, the offender's perceived risk of re-offense: the greater the likelihood of re-offense, the broader and more

detailed the notification to the public." Id. at 1278. Crucially, the court noted that the act's tailoring of notification to risk of re-offense demonstrated its non-punitive effect. Id. at 1281.

The Supreme Court of Washington upheld the constitutionality of Washington's sex offender statute in the face of an ex post facto challenge, partly on the basis that the notification provisions restricted public disclosure. Ward, 123 Wash. 2d. at 502. The court noted that the Washington legislature placed important limits on (1) whether an agency may disclose registrant information, (2) what the agency may disclose and (3) where it may disclose the information. Id. Specifically, the agency may only disclose information when it is "necessary and relevant" for public protection. Id. at 503. The agency may also be limited to disclosing information within a limited geographic area, such as a surrounding community or school. Id. at 504. The court stated that "[t]he scope of disclosure must relate to the scope of the danger." Id. Washington, then, has tailored its statute to allow the release of relevant information only when the offender poses a threat to the community and the goal of public safety is thus at issue. The court stated that, "[a]bsent evidence of such a threat, disclosure would serve no legitimate purpose." Id.

In contrast to the above laws, ASORA does not require evidence of such a threat before disclosure. ASORA contains no structure for intelligently differentiating among sex offenders on the basis of risk to the community, unlike New York's three tier notification system. Instead, ASORA simply allows the information to be posted on a website. Therefore, unlike the situation in most other states, a sex offender's information is automatically posted on the site as a warning to the public without a determination that they actually pose a danger to the public. There is no guarantee, then, that release of information is connected to the needs of public safety. As a result, we can infer that in some cases, disclosure serves no legitimate purpose. Instead, it serves as a punishment to offenders who may or may not pose a risk to the Alaska community. Nor

does ASORA contain any limitations on disclosure. In contrast, the Washington statute noted above carefully limited disclosure both geographically and demographically to ensure both public safety and that the sex offender experiences no unnecessary interference in their lives. For instance, where an individual lives far away from a sex offender or has no reason to fear the sex offender, it is clear that they simply do not have a need for the information. The Washington and New York statutes account for this degree of need; ASORA, however, does not.

While there is precedent for upholding statutes with limited disclosure provisions like those of Washington, no court has ever upheld a statute sanctioning unlimited disclosure. The Kansas Supreme Court declared in Myers that, "[n]either the parties in this case nor our independent research have located a case upholding the constitutionality of a sex offender statute providing for unlimited public disclosure." Myers, 260 Kan. at 687. Because ASORA does not base its notification provisions on any assessment of the risk of recidivism and provides for unlimited public disclosure, it is excessive in relation to the goal of public safety.

7. Balancing the Mendoza-Martinez Factors.

In balancing the Mendoza-Martinez factors, the factors bearing most on the practical harm to sex offenders should be given the most weight. For example, in Doe v. Pataki, the court focused most directly on the extent, effects, and any controls on the provisions of the New York sex offender statute. 120 F.3d at 1278-1279. No one factor alone can determine whether the statute is punitive in effect. Hudson v. U.S., 522 U.S. 93, 101 (1997). Here, although ASORA is not imposed only on a finding of scienter, that factor is of limited weight in assessing the actual punitive effect resulting from the statute. The same is true of the fact that ASORA may have a non-punitive purpose. This factor does not really demonstrate whether the statute is in fact punishing sex offenders.

On the other hand, ASORA's imposition of an affirmative disability on sex offenders should be given great weight because it demonstrates the disruptions and discrimination sex offenders face under the statute. ASORA's excessiveness should be given heavy weight among the factors as well because it clearly demonstrates that offenders are being punished in excess of that required for public safety. The fourth factor, retribution and deterrence, also demonstrates how heavy a burden ASORA places on sex offenders. Additionally, the fact that laws such as ASORA have historically been regarded as punishment because of the shaming they bring on offenders is another factor demonstrating a punitive effect. Last, ASORA applies only to behavior which is already a crime (committing a sex offense). It therefore demonstrates its focus on continuing to punish criminal behavior after an offender's release from prison. Balancing these factors, five of the seven clearly favor a finding of punitive effect and these five bear most directly on whether the statute is punitive in effect. As a result, the effects of the statute provide the "clearest proof" that ASORA is punitive in effect.

CONCLUSION

CT-SORA violates the Due Process Clause because it violates respondent's protected liberty interests and does not provide for an opportunity to be heard. By implying that all registrants could be currently dangerous to the public, CT-SORA clearly imposes a false stigma on individuals who are not currently dangerous. This injurious accusation is further aggravated by unnecessarily wide-spread public dissemination. Because CT-SORA's many burdensome and lengthy requirements act to alter the registrant's legal status and because the registrants are deprived of the right to control the dissemination of their personal information, protected liberty interests have been violated. Moreover, because registrants are not afforded adequate due process procedures in that there is no opportunity to be heard, CT-SORA is unconstitutional.

Although the desire to protect Connecticut citizens is understandable, fundamental constitutional protections should not be displaced. The burden to the state of having a hearing regarding the current threat to society a convicted sex offender may pose is justified by having a fair procedure resulting in truthful dissemination of information.

Similarly, Alaska's need for sex offender provisions is justified in the interests of public safety. The decisions of many Federal Courts of Appeal demonstrate that sex offenders may be subject to requirements that are related to public safety and are not overly burdensome. ASORA, however, goes far beyond the needs of public safety in crafting its registration and notification requirements. Instead, ASORA's provisions punish sex offenders through requirements that aren't even tailored to ensure that public safety is actually at issue. Sex offenders may have committed a grave crime through their behavior but that does not mean that they gave up a right to their freedom once released from prison. ASORA deprives offenders of much of this freedom through unconstitutional penalties. Therefore, because ASORA acts as a retroactive punishment of sex offenders, respondents urge this Court to strike down ASORA as a violation of the Ex Post Facto Clause of the Constitution.

Respectfully submitted,

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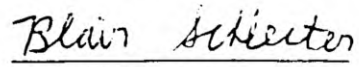

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